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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 482.

LOCAL NO. 207, OF INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS UNION, *et al.*,

Petitioners,

vs.

JACOB PERKO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF FOR RESPONDENT IN OPPOSITION.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF FOR RESPONDENT IN OPPOSITION.

RESTATEMENT OF QUESTION PRESENTED.

The question presented for review is as follows:

Whether the National Labor Relations Act precludes a State court from exercising jurisdiction in a tort action brought by a supervisor against the union to which he formerly belonged where he seeks damages (and not reinstatement) for an unlawful interference with his employment?

ADDITIONAL STATUTES INVOLVED.

Section 14 of the National Labor Relations Act as amended, 29 U. S. C. Section 164(a):

> "(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

Section 8(b)(1) of the National Labor Relations Act as amended, 29 U. S. C. Section 158(b)(1):

> "(b) It shall be an unfair labor practice for a labor organization or its agents * * *
>
> (1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 157 of this title: Provided that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."

Other applicable sections of the National Labor Relations Act are set forth in the Petitioners' Brief on pages 3-6.

RESTATEMENT OF THE CASE.

The chronological statement of the case as set forth in Petitioners' Brief (pages 6-14) is substantially correct. However, in setting forth the "idence established" in the trial under the heading "The Third Round" (pages 9-14), counsel for Petitioners are careful to omit the substantial testimony introduced on behalf of the Plaintiff-Respondent to prove by a preponderance of the evidence that the defendant union had committed a common law tort when, without justification, it interfered with plaintiff's right of employment.

Counsel for Respondent will not attempt to review the evidence, it being assumed, as counsel for Petitioners concede, that the necessary elements of plaintiff's common law action for wrongful interference with his employment were established by competent evidence at the trial of this cause.

STATEMENT.

It is submitted that this cause presents no question that would warrant the granting of a writ of certiorari. The decision of the Ohio court is clearly correct and is not in conflict with prior decisions of this Court. A review of this action, which is peculiarly private in nature, will not resolve or substantially clarify any public policy or any federal question of great public interest.

ARGUMENT:

The question in the present case does not warrant review by this Court for the following reasons:

I.

The Decision of the Ohio Court Is Correct and Clearly in Accord With Settled Principles Enunciated by This Court.

The plaintiff was a job superintendent for the William B. Pollock Company at the time the union committed the tort,[1] and had been employed as a job superintendent for approximately nine years prior thereto. The union's unlawful interference with plaintiff's employment caused the plaintiff to be discharged.[2] The plaintiff's employer and immediate supervisor testified:

> "That we could not use him any longer because he could not work as a job superintendent due to his dispute with the union."[2]

As a job superintendent, plaintiff was specifically exempt from the Act,[3] and being exempt, he could not claim protection under the Act,[4] even though he was a union member.[5]

The facts in the instant case as they appear in the transcript of testimony cannot be enlarged by argument of counsel. Plaintiff was *not* a "foreman." He was job superintendent in charge of all crafts working on the construc-

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[1] Tr. 6, Tr. 40-41.

[2] Tr. 31.

[3] 29 U. S. C., Par. 152 (3).

[4] *N. L. R. B. v. Inter-City Advertising Co. of Charlotte, N. C.*, 190 F. 2d 420 (1951), *certiorari denied*, 342 U. S. 908;
L. A. Young Spring & Wire Corp. v. N. L. R. B., 163 F. 2d 905 (1947), *certiorari denied*, 333 U. S. 837.

[5] 29 U. S. C., Par. 164 (b).

tion project. He had the right and power to hire and fire. The action of the union had nothing to do with his employer, The William B. Pollock Company, or with the selection of representatives for the purpose of collective bargaining or the adjustment of grievances under Section 3(b)(1)(B) of the Act. Plaintiff's employer testified:

> "* * * as I stated before, this was not a jurisdictional dispute, it was between the man and his union * * *."[6]
>
> * * * * *

Even if Respondent were an employee within the meaning of the National Labor Relations Act, there is no substantial basis for arguing that the union's unlawful actions were prohibited by the Act.

Plaintiff was a dues paying member in good standing at the time the union committed the tort. The union's action could not constitute an unfair labor practice under the Act because a union's unlawful action against a member cannot be interpreted as having as its purpose the encouraging or discouraging of membership in a labor organization. Counsel for Petitioners have failed to cite any cases holding that the acts complained of by the plaintiff constitute an unfair labor practice.

It is stated at page 18 of Petitioners' brief that "The substance of plaintiff's claim in this case was that, *because he violated a union rule*, the union * * * forced the plaintiff's employer to discharge him * * *." (Emphasis supplied.) This same *factual assumption* is contained in Petitioners' statement of the Question Presented by this cause. Petitioners then conclude that *Radio Officers v. N. L. R. B.*, 347 U. S. 17 (1950) is in point. At the trial there was testimony of a fine being imposed on plaintiff for purportedly violating a union rule. However, the fact

[6] Tr. 345.

that the union held a trial concerning plaintiff's violation of a union rule and the fact that plaintiff was fined *were not elements of the common law tort committed by the union and were not considered by the jury at the trial of this action.*[7] Therefore, the violation of a union rule cannot *now* be asserted by counsel as the basis for an unfair labor practice by the union.

* * * * *

Petitioners imply but do not argue that the conduct of the union is protected by Section 7 of the Act. Section 7 protects employees' rights to self-organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. It is obviously a section guaranteeing and protecting employees' rights to organize, bargain collectively, and to engage in concerted activities, and does not even remotely concern itself with protecting the individual union member against misconduct against himself by his own union.

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[7] At the trial, counsel for defendant union requested that the court specially instruct the jury as to this conduct on the part of the union, which request was granted, and the jury was instructed as follows:

> "Members of the jury, I charge you as a matter of law that the trial of Jacob Perko by the Executive Board of the Defendant Union on December 8, 1953, was an exercise of a lawful right of the Executive Board of the Defendant Union.
>
> "The findings and penalty of the Local Union as modified by the International Union cannot be questioned in this Court in this proceeding.
>
> "Therefore, the trial, the findings, and the penalty may not be used as evidence of a conspiracy by the Defendant Union against the plaintiff, Jacob Perko." (Tr. 424; see also Tr. 436.)

International Union v. Wisconsin Employment Relations Board, 336 U. S. 245 (1948); *N. L. R. B. v. Dallas General Drivers, Warehouseman & Helpers Local No. 745, AFL-CIO*, 264 F. 2d 642 (1959), *certiorari denied*, 361 U. S. 814.

The plaintiff-respondent's claim for damages is created by the laws of his state that have general application to all persons, corporations and associations. His claim is not predicated on or created by the N. L. R. A. or any other law relating to unions. Petitioners cannot show factually that plaintiff was not a supervisor and therefore exempt from the Act or that the precise conduct of the union *as disclosed by the testimony at the trial* was either protected or prohibited by the Act. Without such proof there can be no pre-emption.

II.

The Decision of the Supreme Court of Ohio Is Not in Conflict With the Garmon Case.

Assuming that petitioners' statement of the question presented by this cause was factually correct, petitioners are incorrect in their claim that the "decision of the Supreme Court of Ohio in this case is in direct conflict with the decision of this Court in the second *Garmon* decision: *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959)."

The *Garmon* case involved the broad question of federal pre-emption of a state court action in a particular area of labor management relations. By virtue of its Constitutional power over interstate commerce,[9] Congress has regulated in the field of labor management relations.[10] Under the supremacy clause of the Constitution,[11] federal legislation pursuant to these delegated powers is said to pre-empt the field, except that a state may act concur-

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[9] *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1 (1824).

[10] *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937).

[11] *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1 (1824).

rently, provided no conflict results and provided further that Congress has not shown an intent to occupy the field exclusively.[12]

The enactment of the Labor Management Relations Act was indicative of Congressional determination that certain areas within the field of labor management relations required uniformity of regulation.[13] The areas pre-empted by the Act are not susceptible of fixed metes and bounds and must be judicially defined.[14]

The question of federal pre-emption has been placed before this Court in the following recent cases: *United Constr. Workers v. Laburnum Constr. Co.*, 347 U. S. 656 (1954); *United Automobile Workers v. Russell*, 356 U. S. 634 (1958); *International Association of Machinists v. Gonzales*, 356 U. S. 617 (1958); and *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959). These cases, applying the principles enunciated in prior decisions of this Court, were the guideposts followed by the Supreme Court of Ohio in its review of this cause below.

In the *Laburnum* case, this Court affirmed the Virginia court's award of damages to an employer for a common law tort, there being violence involved. This Court found no conflict between the state and federal law because the remedy given by the state court was not provided for in the federal act. Further, this Court held that the state was enforcing a private right, whereas the federal statute dealt with public rights.

In the *Russell* case, this Court affirmed the Alabama court's award of damages to an employee for a common

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[12] *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148 (1942).

[13] *Garner v. Teamsters Union*, 346 U. S. 485 (1953).

[14] *Weber v. Anheuser-Busch*, 348 U. S. 468 (1955).

law tort, there being violence involved. This Court found that Congress had not intended to pre-empt the field of damages recoverable from tortious conduct by the provisions for reinstatement to employment and the discretionary back pay awards under the Act.[15] The mere possibility of partial relief in the form of back pay at the hands of the federal agency was insufficient justification for refusing an employee the right to recover in a state court *all* damages sustained as a result of tortious conduct, even though the same conduct might be an unfair labor practice.[16] This Court further found it "erroneous to characterize" a back pay order as "penal or as the adjudication of a mass tort."[17]

In the *Gonzales* case, this Court affirmed the California court's order of reinstatement to a union member unlawfully expelled from his union and the court's award of damages resulting from the breach of the union constitution which consfituted a contract between the union and its members. This Court found that the Act does not provide a remedy of reinstatement to union membership and that the partial relief of a back pay award under 10(c) of the Act does not deprive the individual from available state court remedies to recover *all* damages sustained. This Court further found that "the potential conflict is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member."[18]

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[15] *United Automobile Workers v. Russell*, 356 U. S. 634 (1958) at p. 641-642.

[16] *United Automobile Workers v. Russell*, 356 U. S. 634 (1958) at p. 646.

[17] *United Automobile Workers v. Russell*, 356 U. S. 634 (1958) at p. 643.

[18] *International Ass'n of Machinists v. Gonzales*, 356 U. S. 617 (1958) at p. 621.

In the *Garmon* case, this Court reversed a judgment of the California court awarding damages to an employee resulting from peaceful picketing, such action being a tort under the California Labor Code. This Court stated, "It may be that an award of damages in a particular situation will not, in fact, conflict with the active assertion of federal authority."[19] This Court emphasized the facts involved in the *Garmon* case. "They regulate the vital economic instruments of the strike and the picket line, and impinge on the clash of the still unsettled claims between employers and labor unions."[20] "When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting. (Cases cited.) However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. See *International Assn. of Machinists v. Gonzales*, 356 U. S. 617."[21]

Counsel for Petitioners categorize the *Russell* and *Laburnum* situations as tort actions involving violence and the *Gonzales* situation as a contract action wherein reinstatement in the union is sought and that these two fact situations constitute the *only* exceptions to the rule

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[19] *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959) at p. 247.

[20] *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959) at p. 241.

[21] *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959) at p. 243-44.

of pre-emption. Obviously the National Labor Relations Act has not attempted to define tort actions or contract actions or even crimes that may be or may not be committed by unions against their members. Likewise, this Court has not categorized as pre-empted by the National Labor Relations Act general tort actions against unions either with or without violence. As has been pointed out by this Court the touchstone of pre-emption is conflict with an established federal policy. The form of the action, whether it be in contract or in tort, is of importance only to the extent that the relief sought has an effect on an established federal policy.

The *Gonzales* and *Garmon* cases mark the polarity of considerations which arise in balancing the roles of state and federal courts in the labor-management field. *Garmon*, at one extreme, involved legitimate union use of a vital weapon in labor management relations—peaceful picketing. Use of such a weapon was clearly an element of concern to the framers and modifiers of the N. L. R. A. Mindful of Congressional interest in peaceful picketing, this Court was reluctant to permit the state courts to interfere in any way with picketing so long as it was conducted in a lawful, peaceful fashion.

Gonzales by contrast involved the highly individual problem of a single individual seeking work and the question of internal union affairs, neither of which were matters of substantial regulative concern to the framers of the N. L. R. A. *Gonzales* did not raise the exigencies of direct relations between an organized economic force, the employer, and concerted action by workers through a union. This Court properly termed the union-member relationship "peripheral to the policies of N. L. R. A." and, as stated in *Garmon*, it considered the needs of democracy,

the preservation and protection of the private rights of the individual, paramount to the N. L. R. A.'s concern with group action.

The Supreme Court of Washington has in similar common law tort actions for unlawful interference with one's employment followed the principles outlined by this Court. The case of *Selles v. Local 174, International Brotherhood of Teamsters*, 50 Wash. 2d 660; 314 P. 2d 456 (1957), is cited with disapproval in Petitioners' Brief (page 24), although this Court refused to grant certiorari[22] after having decided the *Russell* and *Gonzales* cases.[23]

The *Selles* case was an action by a discharged superintendent against a union and its members for having caused the employing company to bring about his discharge, the *exact* facts presented by the instant case. The Washington Supreme Court in the *Selles* case, quoting from its prior decision in *Baun v. Lumber & Sawmill Workers Union*, states:

> "Further, we put our conclusion that the Washington courts have jurisdiction of the subject matter of this litigation on the still broader base that the traditional jurisdiction of a state court to enforce a common law tort liability has not been removed, *at least in such a case as the present*, by the Labor Management Relations Act, even though the tortious conduct constitutes an unfair labor practice under the Act.
>
> "In considering this phase of the jurisdictional question, it is well to note at the outset *what the plaintiff is not asking*.

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[22] 356 U. S. 975.

[23] See also *Guzzo v. Steelworkers*, (Calif. 1960), 40 Labor Cases, par. 66,430, *certiorari denied*, 365 U. S. 802 (1960).

"He is not asking that any activities of the union or its members, or that any action by the company be restrained or enjoined; he is not asking that he be reinstated in his position, nor is he asking for back pay. He is not claiming that he is or was an employee within the purview of the Labor Management Relations Act.

"He accepts as *fait accompli* his discharge as superintendent of the company's mill. He alleges that his discharge was achieved in connection with and by means of an unlawful conspiracy, and that the union and its members, without cause or justification, caused his discharge by a threat to strike. His common law action for unlawful interference with his employment or for conspiracy to unlawfully interfere with his employment, and his right to damages therefor differs from any remedy which the National Labor Relations Board has power to provide, and *it does not invoke any question of present or future relations between a company and himself, or the company and its other employees.*

"We know that the Federal Government has preempted the field as to many phases of labor relations, but not as to all. We cannot find from the Act, as interpreted by the Supreme Court, that it was the intention of Congress to deprive a workman of his time honored right to sue in his own state court for damages resulting from a common law tort and to relegate him, for sole relief, to this particular federal agency." (Emphasis by the Court.)

Counsel for petitioners brush off the reasoning of the *Selles* case as being a "pre *Garmon*" case. The *Selles* case does not broadly hold that all tort actions for damages are not pre-empted by the Act. The *Selles* case *does* hold, as does *Garmon, Russell, Laburnum* and *Gonzales* that common law tort actions that might also be unfair labor practices are not pre-empted by the Act if the Act does not

provide an adequate remedy and the action by a state court will not interfere with the basic policy of the Act.

It cannot be argued with reason that Mr. Jacob Perko, the plaintiff in the instant case, must phrase his cause of action in contract and first seek reinstatement in order to open the avenue for a damage action under the holding in the *Gonzales* case. There is no possibility of *any* conflict with federal labor management policy if the injured party completely removes himself from the labor management relations area and sues in tort. By so doing, he removes himself even beyond the "merely peripheral concern of the Labor Management Relations Act." [24]

III.

No Important Question of Federal Law Is Involved.

The United States Supreme Court must, of necessity, confine its review of cases to those where its review "is in the interest of the law, not in the interest of particular parties. It is not the importance of the parties or the amount involved that is controlling, but the need of securing harmony of decision and the appropriate settlement of questions of general importance so that the system of federal justice may be appropriately administered." [25]

The pre-emption question involved in this action has previously been before this Court, and has been decided by this Court. The Supreme Court of Ohio has properly applied the principles enunciated by this Court in its prior decisions to the facts of this particular action.

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[24] *International Ass'n of Machinists v. Gonzales*, 356 U. S. 617 (1958); *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 at p. 243 (1959).

[25] Chief Justice Hughes, Address to American Law Institute, May 10, 1934 *Proceedings of American Law Institute, XI*, p. 313 (1934).

No purpose consistent with the language of Chief Justice Hughes quoted above would be served by granting the petition for a writ of certiorari. The questions raised by Petitioners relate to this particular case only and turn on the facts of this particular case. There is no controversy of substance with respect to any legal principle.

CONCLUSION.

It is respectfully submitted that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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